BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHNATHAN M. ROUSH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,354
HERFF JONES, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 11, 2007 Award of Administrative Law Judge Thomas Klein. Claimant was awarded benefits for 13.33 weeks of permanent partial disability under K.S.A. 44-510d for a scheduled injury to the ring finger of the left hand, plus 1.33 weeks healing period allowance under K.S.A. 44-510d(b), after the ALJ found claimant's urine test sample collected pursuant to K.S.A. 2005 Supp. 44-501(d)(2) was not collected by a licensed health care professional and no evidence that claimant's potential intoxication contributed to claimant's accident.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Blake Hudson of Fort Scott, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). The Board heard oral argument on September 5, 2007.

ISSUES

Did the ALJ err in determining respondent was not entitled to the presumptive impairment defense under K.S.A. 2005 Supp. 44-501? The ALJ determined that a urine sample collected from claimant after the January 17, 2006 injury was not performed by a

licensed health care professional and further that there was no evidence that any intoxication of claimant contributed to the accident. Therefore, the urine sample was excluded from evidence and claimant was awarded 13.33 weeks permanent partial disability and 1.33 weeks healing period, pursuant to K.S.A. 44-510d(a)(6).

FINDINGS OF FACT

Claimant had worked for respondent, a diploma factory, as a freight traffic operator for almost seven years. On January 17, 2006, claimant was on a set of shelves, getting some supplies down. When he let himself down, he grabbed a hold of a crossbar to drop down like he had done on occasions before. The crossbar caught his wedding ring and when he let go, his left ring finger was pulled off.

Claimant reported the accident to human resources. He was taken by private car to Allen County Hospital in Iola, Kansas, where he was given medication for pain and x-rays were taken. That night, claimant was referred to Lawrence Memorial Hospital for treatment by orthopedic surgeon and hand specialist Neal D. Lintecum, M.D. Dr. Lintecum gave claimant two options, which were to either attempt to reattach the finger, or to shorten the finger. Claimant chose to shorten the finger. Claimant testified that he chose that option because Dr. Lintecum could not give him "good odds on whether the finger would take." Surgery to shorten his left ring finger was performed that same night. Claimant's ring finger was amputated to the second knuckle. He was discharged after the procedure.

Claimant received follow-up care with Dr. Lintecum, including checkups to make sure the finger was doing okay. Dr. Lintecum took claimant off work. At an appointment on March 10 or 11, 2006, Dr. Lintecum gave claimant a limited work release, allowing him to return to work with restrictions. He restricted claimant to using the left ring finger as tolerated. Dr. Lintecum was waiting for the scab to heal completely before he fully released claimant. Claimant was fully released at the end of May 2006, without restrictions.

Claimant was examined at the request of claimant's attorney by board certified orthopedic surgeon Edward J. Prostic, M.D. The first time Dr. Prostic saw claimant was on March 6, 2006. He took a history on that date and performed a physical examination.

Dr. Prostic stated that claimant had an amputation of his ring finger at the proximal interphalangeal joint. He also noted that claimant had a broad eschar covering the entire surface of the stump. There was swelling and discoloration from the middle of the remaining phalanx to the eschar. There was also decreased sensation in the distal half of the finger.

Dr. Prostic acknowledged that the results of his physical examination were consistent with the mechanism of injury given to him by claimant as had occurred at Herff Jones. Dr. Prostic predicted that claimant would require additional surgery in the future to shorten his stump or for a Ray resection.

Dr. Prostic saw claimant for a second examination on July 14, 2006. At that time, claimant reported he had had no additional surgery and he had returned to work. Claimant told Dr. Prostic that he was not having pain, but that he had a lack of healing of the tip with a pustule that had some fluid exude from it. In his July 14 report, Dr. Prostic stated that claimant "has had decrease in symptoms from his left hand. He had a pustule at the tip of the finger that expressed fluid but that has healed." Dr. Prostic found that there was stable healing of the stump of the amputated ring finger at the PIP joint, there was full range of motion and there was significant decreased grip. The symptoms and results of his physical examination were consistent with the mechanism of injury occurring on January 17, 2006. Dr. Prostic concluded that claimant had satisfactory healing of his traumatic amputation.

Dr. Prostic provided a rating pursuant to the fourth edition of the AMA *Guides*,[1] finding that claimant had a 10 percent permanent partial impairment of the upper extremity, which would equate to an 11 percent impairment to the hand. Respondent argues any rating would be controlled by K.S.A. 44-510d(a)(6), which would allow a loss equal to two-thirds of the finger due to the amputation at the second knuckle.

Following the accident, claimant's urine sample was taken while he was at Allen County Hospital. It is respondent's policy to drug test all employees alleging workers compensation injuries.

The drug sample was collected on January 17, 2006, by Lea Smith, an employee of Allen County Hospital. Ms. Smith was instructed to take a drug sample from claimant for a drug screen. At the time that Ms. Smith collected this sample, she was not a licensed practical nurse (LPN). In January 2006, she was performing the duties of an emergency room technician, but she had never been certified as an emergency room technician. Part of her duties as an emergency room technician was to take urine samples for drug screens.

At the time Ms. Smith testified, she was an LPN, but in January 2006, when she took the urine sample from claimant, she was not. She took the boards for a licensed practical nurse on February 8, 2006, and she passed. She no longer works at Allen County Hospital. She never worked for Allen County Hospital as an LPN.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Ms. Smith testified that when she obtained the sample from claimant, she sealed the sample. Claimant initialed the seals in her presence. After that, the specimen would have been placed in a basket. At some point, either Ms. Smith or somebody else would have hand-delivered the sample to someplace else in the hospital and from there the samples were either mailed out or picked up. Ms. Smith never specifically identifies where the specimens go after they are placed in the basket.

The urine sample which was taken from claimant was shipped to Clinical Reference Laboratory for testing. John Irving, the director of toxicology at Clinical Reference Laboratory, testified that the seals were intact when the test containers arrived at Clinical Reference Laboratory.

On the Clinical Reference Laboratory form regarding the sample collected January 17, 2006,[2] on Step 2, the yes or no box is not marked. That is the step involving reading the temperature of the specimen and marking yes or no as to whether the temperature was between 90° and 100° F. Ms. Smith confirmed that she did not mark that box. Ms. Smith stated that she has never had one come back cold. She stated, "I always checked it but because I filled out the form before I sometimes forgot that and that was a mistake on my part."[3] Ms. Smith was asked, "Have you ever, do you recall ever having a specimen that did not read between 90 degrees and 100 degrees?" Ms. Smith responded, "No, I have not."[4] Ms. Smith acknowledged that she does not have an independent recollection of checking the temperature of this specimen.

With respect to the temperature of the specimen, Dr. Stephen Kracht, the medical review officer, testified that the purpose of checking the temperature is that if the sample is not in the correct range, that would indicate the specimen was brought in from outside and the person did not produce his or her own specimen. That would be important on a negative result because that would indicate the specimen was not from the person being tested. Dr. Kracht stated that on a positive result, it does not have that much bearing because the donor signed that the specimen is his or hers. It is not of concern on a positive result. The results of this testing on claimant were positive for marijuana metabolite at 87 nanograms per milliliter.

On January 26, 2006, claimant was terminated by respondent because of the failed post-accident drug screen. Claimant testified that he was not under the influence of any drugs or alcohol on the day he was injured. The testimony of claimant in this regard

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[2] R.H. Trans., Resp. Ex. 1.

[3] Smith Depo. (July 20, 2006) at 19.

[4] Smith Depo. (July 20, 2006) at 24-25.

is uncontradicted in this record. There is no indication in this record that claimant was impaired or that his alleged impairment contributed to the accident.

Claimant initially had restrictions to use the left ring finger as tolerated. Claimant did not look for a job at that time. He wanted to wait until he was fully healed. He did not think he could get a job until he was fully healed. Claimant started working for Sonic Equipment Company on August 28, as a service tech in training.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

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[5] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2005 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 2005 Supp. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
>
> | | Confirmatory test cutoff levels (ng/ml) |
> |---|---|
> | Marijuana metabolite [1] | 15 |
> | . . . | |
>
> An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:
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> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
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> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
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> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
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> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

> (3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:
>
> (A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;
>
> (B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;
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> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
>
> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

Claimant contends the results of the urine test do not meet the very specific requirements of K.S.A. 2005 Supp. 44-501(d)(2), in that the person responsible for obtaining the test was not a licensed health care professional at the time the test sample was obtained. Lea Smith had graduated from nursing school, but had not yet taken her licensing examinations. Respondent counters, arguing that K.S.A. 65-1124 states:

> No provisions of this law shall be construed as prohibiting:
>
> . . .
>
> (o) the practice of nursing by graduates of approved schools of professional or practical nursing pending the results of the first licensure examination scheduled following such graduation but in no case to exceed 120 days, whichever comes first . . . .

Ms. Smith obtained the test sample from claimant on January 17, 2006. Ms. Smith did not take her licensing tests until later. At the time of the testing on claimant, she was temporarily allowed to practice nursing, but was not "a licensed health care professional" as is required by K.S.A. 2005 Supp. 44-501(d)(2). Therefore, the tests taken from claimant would not be admissible evidence to prove claimant's impairment.

Additionally, even if the sample were admitted into evidence, and even considering the amount of marijuana in claimant's system exceeded the accepted levels in K.S.A. 2005 Supp. 44-501(d)(2), the statute still requires a showing that the injury was contributed to by the use of the drug. There is no evidence in this record that claimant's presumptive impairment contributed, in any way, to this accident. Therefore, for the above reasons, the test results from the urine sample taken by Ms. Smith are not admissible as evidence in this record and there is no proof that claimant's injuries were contributed to by the use of any controlled substance.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. The test results from the urine sample taken by Ms. Smith from claimant on the date of accident were properly excluded from the evidence in this record, and respondent has failed to prove claimant's presumptive impairment contributed to this accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated May 11, 2007, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[9]

IT IS SO ORDERED.

[9] K.S.A. 44-536(b).

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge